

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
FIRESIDE MEDIA and JET FUEL)	
BROADCASTING)	FOIA Control No. 2011-131
)	
On Request for Inspection of Records and)	
Review of Estimated FOIA Processing Costs)	

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 2011

Released: October 25, 2011

By the Commission:

I. INTRODUCTION

1. We have before us two Applications for Review (AFRs) jointly filed by Fireside Media and Jet Fuel Broadcasting (respectively, Fireside and JFB; jointly, Fireside)¹ arising from their Freedom of Information Act (FOIA)² request for records concerning FM Auction 37 in 2004.³ The first AFR seeks review of the decision of the Office of General Counsel (OGC) denying Fireside's request for a waiver or reduction of fees for processing its FOIA request and producing the documents sought.⁴ The second AFR seeks review of a fee estimate prepared by the Wireless Telecommunications Bureau (WTB) for processing the FOIA request.⁵ We agree with OGC that Fireside failed to demonstrate that a FOIA fee waiver is warranted for processing its request. We also uphold WTB's reasonable fee estimate. Accordingly, we deny both AFRs.

II. BACKGROUND

2. Fireside's FOIA request sought the following:

All correspondences [sic] (written or electronically submitted) to the FCC in which complaints were made about allegedly illegal activity or other improper conduct by participants in 'FM Auction 37' (*i.e.*, such as collusion, bidder identity masking, efforts to keep certain bidders from obtaining a particular frequency, etc.), or that complained of any

¹ Dave Garey (Garey), proprietor of Fireside and JFB, filed the FOIA request and all pleadings and correspondence in this matter on behalf of Fireside and JFB.

² E-mail from Garey on behalf of Fireside and JFB to the Commission at FOIA@fcc.gov (Jan. 5, 2011).

³ See *Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures*, Public Notice, 19 FCC Rcd 10570 (WTB/MB 2004) (*Auction 37 Public Notice*).

⁴ Application for Review (Mar. 9, 2011) (First AFR).

⁵ Application for Review (rec'd Apr. 27, 2011) (Second AFR).

other alleged wrongdoing or improprieties connected to this auction. We also respectfully request complete documentation showing exactly how the FCC responded to and ultimately resolved each of the above-referenced complaints it received.⁶

Fireside also sought a waiver reduction of fees for processing the FOIA request. OGC denied this request, finding that (i) the requester had provided no basis beyond mere speculation for believing the documents would disclose significant information regarding alleged improprieties in FM Auction 37, and (ii) the primary purpose of the FOIA request appears to be Fireside's pursuit of its own private interest in challenging the Commission's prior cancellation of its licenses, rather than informing the public.⁷ Fireside filed the First AFR in response to this decision.

3. After OGC denied Fireside's request for a waiver or reduction of fees, WTB sent Fireside an estimate of the costs for processing its FOIA request, including fees for locating, reviewing, and producing any responsive documents.⁸ Fireside then filed an AFR of the fee estimate asking that the estimate be "rescind[ed]" pending resolution of the First AFR.⁹ Fireside also e-mailed WTB, asking it to "rescind" or reverse the fee estimate for the same reason.¹⁰ WTB declined to rescind the fee estimate, but informed Fireside that its FOIA request would be held in abeyance pending a decision on the First AFR challenging the fee waiver denial.¹¹

III. DISCUSSION

A. The Fee Waiver Denial

4. We find that Fireside has not demonstrated its entitlement to a fee waiver under the FOIA. The applicable section of the Commission's FOIA rules provides that a waiver of FOIA fees may be granted if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."¹² To qualify for a fee waiver, the requester must demonstrate specifically how disclosure of the materials sought will contribute significantly to the public's understanding of the operations or activities of the government.¹³ Under FOIA case law, "the burden for satisfying the public interest standard" rests on the requester¹⁴ and "requests for public interest fee waivers must be reasonably detailed and specific."¹⁵ "Conclusory statements that the disclosure of the

⁶ E-mail from Fireside and JFB to the Commission at FOIA@fcc.gov (Jan. 7, 2011).

⁷ OGC Letter, at 2-3.

⁸ Letter from Gary D. Michaels, Deputy Chief, Auctions/WTB, to Dave Garey (Mar. 29, 2011) (*WTB Fee Estimate Letter*).

⁹ Second AFR, at 1.

¹⁰ E-mail from Dave Garey to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, WTB (Apr. 14, 2011) (*Fee Rescission Request E-mail*).

¹¹ Letter from Gary D. Michaels, Deputy Chief, Auctions/WTB, to Dave Garey (June 17, 2011) (*Second Fee Letter*). WTB informed Fireside that if it wished processing of its FOIA request to continue while its First AFR was pending, it could prepay the fee estimate and obtain a refund if its waiver request was ultimately granted. Fireside chose not to pursue that option.

¹² 47 C.F.R. § 0.470(e) (quoting 5 U.S.C. 552(a)(4)(A)(iii)).

¹³ *Id.*; see also §47 C.F.R. 0.470(c) (fee waiver request must include a statement "explaining with specificity" the reasons demonstrating why requester qualifies for waiver).

¹⁴ *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (citations omitted); accord, *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 60 (D.D.C. 2002) (*Judicial Watch III*).

¹⁵ *Judicial Watch III*, 185 F. Supp. 2d at 60.

requested documents will serve the public interest are not sufficient to meet this burden.”¹⁶ Thus, the courts have rejected as insufficient vague and unsubstantiated assertions of a public interest benefit that rely on speculation.¹⁷

5. Here, Fireside seeks records concerning what it alleges to be improprieties in the conduct of FM Auction 37.¹⁸ In its request for a fee waiver or a restricted fee assessment,¹⁹ Fireside denied any commercial interest in obtaining the documents sought, stating that it would not profit from their release. At the same time, however, Fireside states that its FOIA request “relates specifically to a matter under final appeal ‘reconsideration’” pending before the Commission.²⁰ Fireside nonetheless claimed to be entitled to a fee waiver or reduction because of an asserted public interest in alleged misconduct in FM Auction 37.²¹ OGC correctly identified the problem with Fireside’s argument that it should receive a fee waiver:

We acknowledge Fireside’s suggestion that, if the documents it seeks were to disclose that it had been treated improperly, the documents might shed light on the integrity of the Commission’s processes. Fireside, however, provides no basis beyond mere speculation that the documents

¹⁶ *Id.* at 60 (citing *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987)).

¹⁷ *VoteHemp, Inc. v. DEA*, 237 F. Supp. 2d 55, 61 (D.D.C. 2002) (rejecting as “rank speculation” requester’s claim that records of the Drug Enforcement Administration would contribute significantly to the public understanding of government operations by revealing the agency’s alleged “ulterior motive” for adopting a rule); *see also D.C. Technical Assistance Org., Inc. v. U.S. Dep’t of Housing and Urban Dev.*, 85 F. Supp. 2d 46, 49 (D.D.C. 2000) (rejecting as lacking “any basis in reality” requester’s claim that records regarding a housing program would demonstrate that the agency sought to dismantle the program in “bad faith”).

¹⁸ This is not the first time Fireside has raised questions about FM Auction 37 with the Commission. Fireside participated in FM Auction 37, the first Commission auction of FM radio frequencies, but withdrew while the auction was still in progress and was assessed penalties. Fireside subsequently notified the Commission that due to financial hardship it was unable to pay those penalties, and the Commission compromised the penalties in 2008. *Order*, 23 FCC Rcd 13138, 13139 (2008) (*Fireside Media Order*). Fireside then filed a Petition for Partial Reconsideration of the *Fireside Media Order*, which the Commission dismissed as untimely filed while also rejecting all of Fireside’s arguments, particularly with respect to the alleged unfairness of the bid withdrawal penalties and their effect on Fireside. *Memorandum Opinion and Order*, 25 FCC Rcd 2453, 2454-57 (*Fireside Reconsideration Order*). Nonetheless, Fireside or its proprietor, Garey, continued to press its claims concerning FM Auction 37 in the context of AM Auction 84 and related application and construction permit proceedings. The Commission likewise rejected those claims. *Jet Fuel Broad.*, *Memorandum Opinion and Order*, 25 FCC Rcd 12935, 12939 (2010); *Fireside Media and Jet Fuel Broad.*, *Memorandum Opinion and Order*, 25 FCC Rcd 7754, 7757 (2010); *see also Fireside Media Order*, 23 FCC Rcd 13138 at 13139, n.6.

¹⁹ Fireside sought “a restricted fee assessment or waiver” for its FOIA request. FOIA Request at 3-4 (citing 47 C.F.R. § 0.470(a)(2) (educational, non-commercial scientific, and representatives of the news media requesters), § 0.470(a)(3) (“all others” requesters), and § 0.470(e) (fee waivers)). Although Fireside cited all three subsections, it did not indicate which apply to it – even though sections 0.470(a)(2) and (3) are mutually exclusive. Because Fireside made no argument as to why it would qualify as an educational, non-commercial scientific requester or representative of the news media, it appears to be arguing that it is an “all others requester” entitled to a restricted fee assessment (*i.e.*, reduction) or waiver under section 0.470(e). As discussed in the text, a requester seeking a restricted fee assessment or waiver under section 0.470(e) must show that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

²⁰ Fireside refers to a pending petition for reconsideration of a Commission decision dismissing Applications for Review filed by Fireside and Jet Fuel Broadcasting regarding their failure to prosecute applications for three AM stations. *See Fireside Media and Jet Fuel Broad.*, 25 FCC Rcd 7754.

²¹ *Id.*

will disclose significant evidence of this kind. Mere speculation that the documents will disclose significant information is insufficient to support a request for fee waiver. In any event, it does not appear that the purpose of Fireside's FOIA is to inform the public. Rather, it appears that Fireside intends to use the information obtained through the FOIA request to pursue its private interest in prosecuting appeals of the Commission actions cancelling its authorizations. The pursuit of such private interests, as opposed to furthering public understanding of the operations or activities of the government, is insufficient to support a fee waiver. Fireside gave no indication that it intends to actually disseminate the documents sought to the public, as required to support a fee waiver, but indicates that it intends to use the documents in private litigation efforts. . . . [It] is difficult to understand Fireside's claim that the request is not related to its commercial interests in view of its explanation that the Commission actions that Fireside seeks to appeal have made it impossible for [Fireside] to earn any profit or revenue from [its radio station] enterprise. Inasmuch as the stated purpose of Fireside's request is to obtain information to restore its radio authorizations, the request is clearly in Fireside's commercial interest.²²

We agree with OGC's analysis, and, as we now explain, nothing argued by Fireside in the First AFR suggests a different result.

6. Fireside contends that the release of the requested documents will have greater value to the public interest than to any commercial use by Fireside itself. It asserts that the requested documents have no "direct relation to [Fireside], or to any commercial interest of [Fireside]..."²³ Because it currently holds no broadcast licenses and is therefore unable to generate any revenue, Fireside argues that it cannot have any "commercial interest" in the requested documents. We disagree. Fireside's argument is inconsistent with 47 C.F.R. § 0.466(a)(4), which defines a "commercial use request" as one "from or on behalf of one who seeks information for a use or purpose that furthers the commercial interests of the requester." The succession of petitions and other pleadings filed by Fireside concerning FM Auction 37, the imposition of the bid withdrawal penalties on Fireside, and the impact of that action clearly demonstrate the predominance of Fireside's own private, commercial interest in the requested documents.²⁴ Fireside, moreover, has represented that it intends to continue to press these issues before the Commission.²⁵

7. As OGC noted,²⁶ if the records Fireside sought "were to disclose that Fireside had been improperly treated, the documents might shed light on the integrity of the Commission's processes. Fireside, however, provides no basis beyond mere speculation that the documents would disclose significant

²² OGC Letter at 2-3 (footnotes omitted).

²³ First AFR at 7.

²⁴ See n. 18, *supra*; see also *McClain v. U.S. Dep't of Justice*, 13 F.3d 220, 221 (7th Cir. 1993) (denying a fee waiver for a request for records pertaining to the investigation and prosecution of the requesting party himself); *Research Air, Inc. v. Kempthorne*, 589 F. Supp. 2d 1, 10 (D.D.C. 2008) (finding that requester's use of documents to challenge suspension of pilot's card was "primarily to benefit [requester's] commercial interests.").

²⁵ Fireside Petition for Partial Reconsideration at 4.

²⁶ *Id.* at 2.

evidence of this kind.” Fireside also speculates that the records have been “suppressed by the Commission without reason, and in conflict with the public interest,”²⁷ raising unanswered questions about FM Auction 37.²⁸ However, as discussed in paragraph 4, above, such speculative claims are insufficient to obtain a fee waiver.²⁹ Furthermore, we are unaware of any current public interest in FM Auction 37 other than by Fireside.³⁰

8. Fireside also questions OGC’s conclusion that Fireside would not disseminate the records, declaring that it “passionately” intends to make the released documents easily available to any interested party, and that it will provide an electronic copy of the documents to any requester or will work with the Commission to assure that they are prominently displayed on the Commission’s website.³¹ This does not satisfy the requirement that the records be disseminated to a sufficiently broad audience of interested persons. Requesters seeking a fee waiver who assert that they will passively make available the documents to anyone who might seek access to them do not meet their burden of demonstrating with the required specificity that the information will be communicated to the public.³²

B. The Fee Estimate

9. The Second AFR challenges WTB’s estimate³³ that the cost to Fireside of the requested search and review of responsive records, plus duplicating costs, would be \$1,380.³⁴ While the Second AFR’s title asks for a rescission of the WTB fee estimate pending disposition of its fee waiver appeal, the Second AFR actually challenges the fee estimate and seeks production of the documents without charging FOIA fees. As a commercial requester, Fireside is responsible for all search, review and copying costs.³⁵ WTB estimated that a search and review of the records requested in Fireside’s FOIA – complaints about FM Auction 37 and documentation showing how these complaints were resolved – would take a GS-15 employee 15 hours plus two hours of time by a GS-13 employee.³⁶ Fireside argues essentially that the records should not be difficult to locate.³⁷ We have no reason, however, to dispute WTB’s fee estimate.

²⁷ First AFR at 1.

²⁸ *Id.* at 2.

²⁹ See *VoteHemp*, 237 F. Supp. 2d at 61; *D.C. Tech. Assistance*, 85 F. Supp. 2d at 49.

³⁰ Fireside cites (First AFR at 5-6 and Ex. D) a newspaper article from the December 9, 2004 edition of the *North Coast Journal*, entitled “Radio Madness,” concerning FM Auction 37. An almost seven-year old article from a local newspaper does not support a current and significant public interest in the auction. Fireside also points to public interest in spectrum scarcity and radio station ownership in local markets (First AFR at 2), but fails to demonstrate any connection between those issues and an auction conducted in 2004.

³¹ First AFR at 6.

³² See *Van Fripp v. Parks*, No. 97-0159, 2000 U.S. Dist. LEXIS 20158 (D.D.C. Mar. 16, 2000) (placement in library amounts to, at best, a passive method of distribution that does not establish entitlement to fee waivers); *Robert J. Robbins, Call Commc’ns Group, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 6685, 6686-87 (2006) (radio station’s claim it would place records in a library not sufficient to demonstrate dissemination “in a manner likely to contribute significantly to the public understanding of the operations or activities of the government.”).

³³ *WTB Fee Estimate Letter*.

³⁴ Second AFR.

³⁵ 47 C.F.R. § 0.470(a)(1).

³⁶ *WTB Fee Estimate Letter* at 2 n.4.

³⁷ Second AFR at 2-3, 4.

Contrary to Fireside's assertion, the records sought are not in the possession of any one individual, and if located, any responsive records would have to be reviewed to determine whether all may be released, or whether some or all of the records should be withheld under a FOIA exemption. Given the breadth of Fireside's request, WTB's estimate was reasonable. We remind Fireside, moreover, that it will be responsible for only the search, review, and processing time that Commission staff actually spend in responding to the FOIA request. If Fireside tenders more fees than are actually chargeable, it will be entitled to a refund of the difference.

10. Finally, Fireside challenges WTB's observation that Fireside will be charged fees for locating and reviewing documents that are responsive but that may be withheld under an applicable FOIA exemption.³⁸ WTB's observation was correct, and is consistent with our rules.³⁹

11. The Commission will not proceed with the processing of Fireside's FOIA request unless and until Fireside pays the estimated fees.⁴⁰ If Fireside does not pay the estimated fees within 30 days of the release of this decision, the file on its FOIA request will be closed.⁴¹ If Fireside pays the estimated fees, the time frame for processing Fireside's FOIA request shall commence upon payment of the estimated fees.⁴²

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the Application for Review filed March 9, 2011 by Fireside Media, Inc. and Jet Fuel Broadcasting IS DENIED.

³⁸ Second AFR at 3-4.

³⁹ See 47 C.F.R. § 0.467(b) (fees are charged even if no records are located or if records are withheld under applicable FOIA exemptions).

⁴⁰ See 47 C.F.R. § 0.469(a) (where fees will exceed \$250 and requester has no history of payment of fees, pre-payment may be required).

⁴¹ Before that time, Fireside may contact WTB to discuss the scope of its request and possibly modify the request to reduce the fee estimate.

⁴² See 47 C.F.R. § 0.461(e)(2)(i)(B)(1) and (3) (time for processing a FOIA request is tolled pending a decision concerning a request for a fee waiver, and until the fees are paid if required under section 0.469). Similarly, if Fireside seeks judicial review of this decision and does not pay the estimated fees, the time for processing its request will be tolled. *Id.*

13. **IT IS FURTHER ORDERED** that the Application for Review received April 27, 2011 from Fireside Media, Inc. and Jet Fuel Broadcasting IS DENIED. Fireside Media and Jet Fuel Broadcasting may seek judicial review of these actions pursuant to 5 U.S.C. § 552(a)(4)(B).⁴³

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴³ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Fireside and JFB's right to pursue litigation. Fireside and JFB may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448.